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WM. R. STANSBURY

United States Supreme Court.

OCTOBER TERM, 1923.

No. 141

THE TEXAS TRANSPORT & TERMINAL COMPANY, INCORPORATED,

Plaintiff in Error,

versus

THE CITY OF NEW ORLEANS,

Defendant in Error.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

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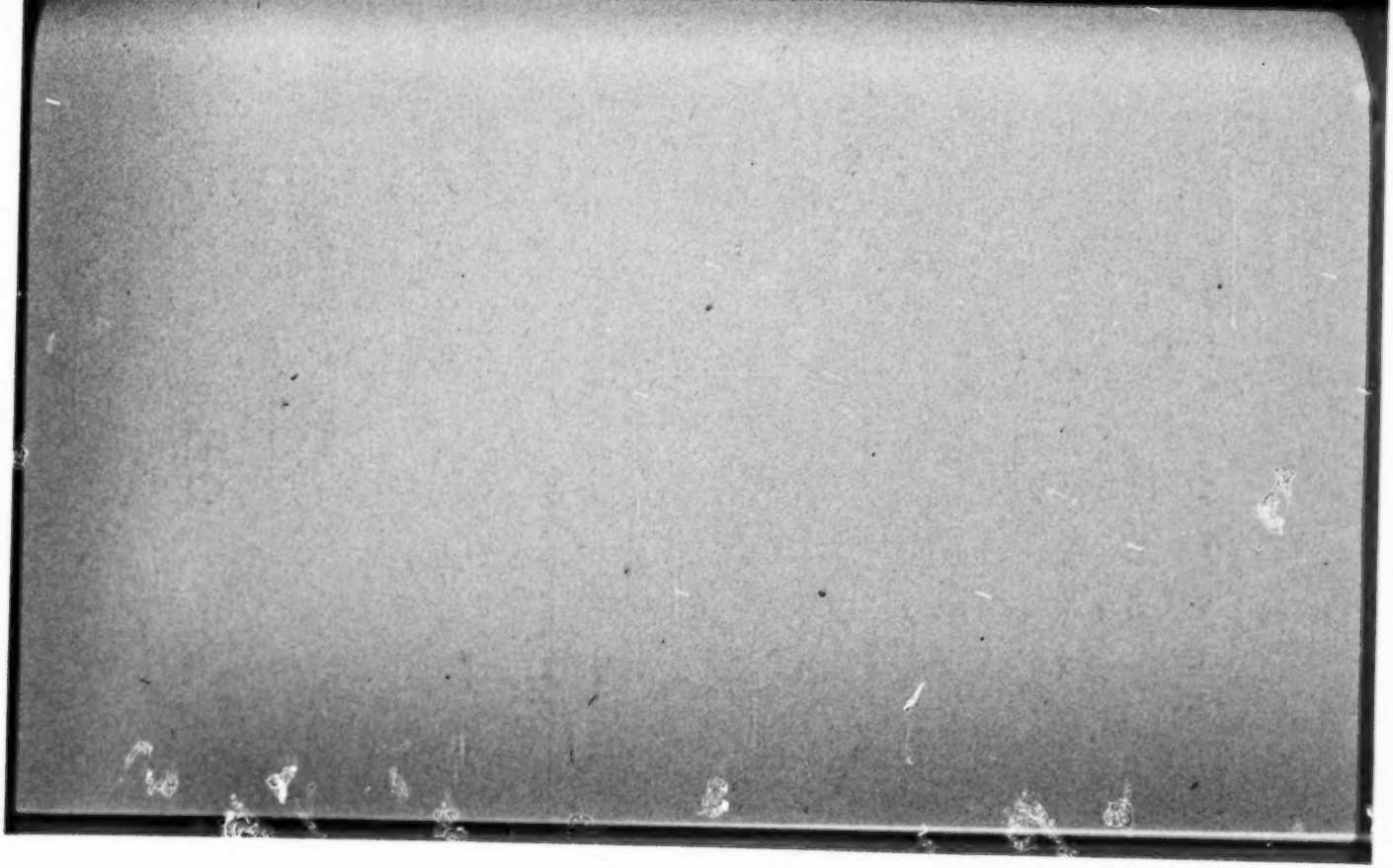
Hauser Ptg. Co., "The Legal Printers." 720 Poydras St., New Orleans



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In our original brief, we did not quote from the ordinance levying the tax. This seemed unnecessary, as the effect of the ordinance was stipulated and as there is no dispute as to its interpretation.

However, as the rule of court may be construed to re-

quire that the pertinent provisions of the ordinance be set forth in the brief, we ask leave to file this supplemental brief, in which is set forth so much of the ordinance as may be necessary to decide the case.

Ordinance No. 6608 of the Commission Council Series of the City of New Orleans reads as follows:

> "AN ORDINANCE levying license taxes for the year 1922, and providing for the collection thereof.
>
> Section 1. Be it Ordained by the Commission Council of the City of New Orleans that license taxes for the year 1922 are hereby levied upon every person, association of persons, firm or corporation pursuing any trade, profession, vocation, calling or business that may be rendered liable to a license tax, as follows, to-wit:
>
> **************
>
> Section 29. Every individual, firm, association or corporation, carrying on the profession or business of draying, trucking, keeping cabs, carriages, hacks, horses or motor vehicles for hire, undertaker, funeral director, steam or electric laundry business, agency for steamboats and owners or lessees of toll bridges or ferries, stevedores and those engaged in the business or profession of bill posting, tacking or advertising, the license shall be based upon the gross annual receipts from such profession or business, and shall be fixed and graded, as follows, to-wit:
>
> **************
>
> First Class.—When the gross receipts are one hundred thousands dollars or more, the license shall be four hundred dollars ($400).

****

Section 40. All licenses shall be due and collectable during the first two (2) months of each year, and all unpaid licenses shall become delinquent on the first day of March of each year, and all persons, firms, association of persons and corporations who commence business after that date shall become delinquent unless the license is paid within ten days after commencing business.

Section 41. All unpaid licenses shall bear interest at the rate of two per cent per month from the first day of March, and the payment thereof shall be secured by first lien and privilege in favor of the City upon the property, movable and immovable, and the Commissioner of Public Finances shall collect said license and interest in the manner provided by existing laws.

****

Section 52. If any business shall be conducted without a license, in case herein provided, the officer whose duty it is to issue licenses, shall, through the city attorney, on motion in the proper courts as provided in the Constitution, and which shall be without deposit or advance cost, take a rule on the party or parties doing such business to show cause, on the fifth day exclusive of holidays, after the service thereof, which may be tried out of term times and in chambers, and shall always be tried by preference, why said party or parties should not pay the amount of the license claimed and penalties, or be ordered to cease from further pursuits of said business, until after having obtained a license; and in case said rule is made absolute, the order thereon rendered shall be considered a judgment in favor of the city, for the

amount decreed to be due by the defendant for license and penalty and costs heretofore and herein above provided for, and shall be executed in the same manner as other judgments, and every violation of the order of the court shall be considered as a contempt thereof, and punished according to law.

Section 53. On all license claims placed in the hands of the City Attorney, the City Attorney shall claim, in addition to all other costs and penalties, ten per cent upon the aggregate of the license and penalties, as attorney's fees for the benefit of the General Fund of the City of New Orleans. (Act 115 of 1921.)

Respectfully submitted,

GEORGE H. TERRIBERRY,

JOSEPH M. RAULT,

Attorneys for The Texas Transport & Terminal Company, Incorporated, Plaintiff in Error.

New Orleans, La., November 5, 1923.

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OCTOBER TERM, 1922.

In the

Supreme Court of the United States

THE TEXAS TRANSPORT AND TERMINAL COMPANY, INCORPORATED,

Plaintiff in Error,

versus

THE CITY OF NEW ORLEANS,

Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

IVY G. KITTREDGE,
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Counsel for the City of New Orleans,
Defendant in Error

January, 1924.

Hauser Ptg. Co., "The Legal Printers," 720 Poydras St., New Orleans

INDEX.

	Page
Statement of the Case	1
Argument	2
Cases Cited:	
American Manufacturing Company vs. St. Louis 250 U. S. 460	17
Armour & Co. vs. Virginia 246 U. S. 1	20
Chaney Bros. Company vs. Mass, 246 U. S. 153	22
Crutcher vs. Kentucky 141 U. S. 47	18
Ficklen Case 145 U. S. 1	10
Hooper vs. Calif. 155 U. S. 653	20
Hopkins vs. U. S. 171 U. S. 573	17-23
International Text Book Co. vs. Pigg, 217 U. S. 110	18
Kansas City Ry. Co. vs. Kansas 240 U. S. 227	22
McCall vs. California 136 U. S. 104	5
Norfolk R. R. vs. Pennsylvania 136 U. S. 114	18
Pacific Express Company vs. Seibert 142 U. S. 349	19
Robbins Case 120 U. S. 489	21
Saulte Ste Marie vs. International Transit Co. 234 U. S. 341	22
Smith vs. Alabama	8
State of N. Y. ex rel Pennsylvania R. R. vs. Knight 192 U. S. 21	15
Stockard vs. Morgan 185 U. S. 27	21
Western Union Telegraph Co. vs. Kansas 216 U. S. 1	21
Williams vs. Fears, 179 U. S. 270	20

No. 672.

OCTOBER TERM, 1922.

In the

Supreme Court of the United States

THE TEXAS TRANSPORT AND TERMINAL COMPANY, INCORPORATED,

Plaintiff in Error,

versus

THE CITY OF NEW ORLEANS,

Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

May It Please the Court:

In this case the City of New Orleans, defandant in error, sues the Texas Transport & Terminal Company, plaintiff in error, for a license for engaging in the business of steamship agent during the year 1922. The pleadings, facts and specification of errors are stated in the brief of plaintiff in error (pp. 1 to 10, incl.). We will supplement them only by the following brief statement.

Though the bulk of the business done by plaintiff in error consisted of services rendered to certain steamship lines and tramp steamers engaged in foreign commerce, nevertheless the

testimony nowhere shows that the business of plaintiff in error is, either in its nature or by intent, confined to serving said particular steamship lines and tramp steamers, or to serving steamship lines and steamers engaged in foreign commerce; but on the other hand, the testimony does show that plaintiff in error is "very willing to act for all principals that will engage their services" (Tr. p. 15), and to "render service to anybody and take agency from any one from any port in the world" (Tr. p. 15). The testimony also shows that all business done by plaintiff in error is begun, transacted and completed locally, in the City of New Orleans (Tr. pp. 16, 17, 18). Thus the steamship agency business of plaintiff in error is shown to be a general business, not identified with any particular steamship line or lines, but separate and distinct therefrom, and extending or open to any and all steamship lines and steamers whatsoever, including those engaged in intrastate commerce, as well as those engaged in interstate and foreign commerce.

The issue herein is whether or not a license tax levied on this sort of business is repugnant to that provision of the Federal Constitution which gives Congress power "to regulate commerce with foreign nations and among the several States."

ARGUMENT.

The issue involves two inquiries: First, is the business or industry interstate commerce?

Second, is the tax a direct tax on interstate commerce such as would amount to a burden on and a regulation thereof forbidden by the United States constitution?

Does the license tax levied by the City upon the plaintiff in error in this case amount to a regulation of interstate commerce violative of the Federal constitution? We submit that

it cannot amount to a regulation of interstate commerce unless it is a tax directly on that commerce; and that if its effect be "indirect, incidental or remote so as not to burden or impede such commerce," it is not in conflict with the constitution of the United States.

In *McCall vs. California*, 136 U. S. 104, relied on by appellant, interstate commerce is defined:

"Commerce with foreign countries and among the states, strictly considered, consists of intercourse and traffic, including in these terms navigation and transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities."

We accept the definition.

We propose to show that plaintiff in error's business does not come within the definition, and that hence the license tax imposed upon it is not a direct tax amounting to a "regulation" of interstate commerce, and if connected with the latter at all is only remote or hazily indirect.

Plaintiff in error claims that identifying seamen, buying coal and other provisions, securing stevedores for loading and unloading ships, and other like services, are interstate commerce, and that to require a steamship agent holding itself out to do a general business along those lines to pay a license to the City of New Orleans, similar to that charged every other agency and every attorney-at-law in this city, would amount to a regulation of commerce in violation of the Federal Constitution. If plaintiff in error is engaged in interstate commerce, then *quoad* such practice as this its counsel now before this Honorable Court is engaged in interstate commerce and owes no license to the city, for what is the difference between plaintiff in error collecting the freight due the ship and an attorney-at-law collecting freight or debts due the ship? If it is interstate commerce for plaintiff in error to procure coal for the ship, then the vendor of the coal

owes no tax or license for selling the coal to the ship, and his lessor owes no tax or license for the premises rented to the vendor of the coal; and the seller of the mules or motor trucks to the coal vendor, *quoad* coal delivered to such ships, owes no license or tax on the mules or trucks; nor does the grain dealer who sells the feed for the mules engaged in hauling this coal owe either license or tax; nor do market people, butchers, vegetable venders and grocers owe licenses or taxes if they can show that, though they hold themselves out to serve the whole public, the major part of their business is with steamships coming to this port and engaged in interstate commerce, and that hence they, themselves, are really engaged in interstate commerce. Follow plaintiff in error in contention and it leads to a *reductio ad absurdum*. Following plaintiff in error in contention, this city should at once curtail her strenuous efforts to enlarge her business as a port, and to increase her population. If plaintiff in error be correct then the millions of dollars that this city has spent, is still spending and owes for her publicly owned docks and industrial canal will probably never be paid because of the paradoxical fact that just in proportion as she increases her foreign and through traffic, and has not only the six-mile river front, but also the several miles of canal alive with ships, with huge trunk lines of railroad working to the full capacity, of elevators carrying foreign routed grain, just in proportion must the city become poorer and poorer and call on the balance of the people to support this enormous class, all of whom will pay neither license nor tax on the ground that they are engaged in interstate commerce. Think for a moment of the extra cost alone of the police and fire departments, to say nothing of paving, lighting and water, to care for this huge foreign industry and the accompanying growth of the population of the city, and yet, as to the city's exchequer, the steamship owners, steamship agents, coal vendors, railroads, even the laborers would be

deadheads; all will pay nothing, but the balance must support them. Perhaps it will be that the city will rue the day that it undertook this enormous dock extension system to bid for interstate commerce, but we do not believe that this Court will follow the strained and reactionary decision of the *McCall case*, relied on by appellant, even were the facts of that case the same as those of this case, which we deny.

We submit that the tendency of litigation in late years has been to stretch Article I of the United States constitution to the breaking point, encroaching more and more on the rights of the States to conduct their internal affairs as they see fit without being hailed before the Federal courts as violating the national constitution. Under our scheme of government, all doubts must be decided in favor of the State, because all powers are lodged in the State except those that have been specifically and expressly conferred upon Congress by the Constitution of the United States. Therefore such powers should be strictly construed. This doctrine the Supreme Court of the United States, we are glad to say, is now adhering to in spirit and letter, more so than it did when Justice Harlan, the noted advocate of centralized federal power, and Justice Lamar sat in that court. No better illustration of the present tendency is at hand than the recent decisions of this same court since the McCall case in 1889.

The McCall decision, from which Chief Justice Fuller and Justices Gray and Brewer dissented, is not reasoned out, is but a few pages in length, and settles the question by considering in a terse manner some half dozen decisions of the Supreme Court. All of the facts that can be gleaned are that McCall was the direct representative in San Francisco of the New York, Lake Erie and Western R. R. Co., domiciled in Chicago, and operating between that city and New York, and that his duties were those of a special drummer soliciting passengers

to go East over his principal's road from Chicago to New York. He did no other work. The presumption must be that he received a salary.

Note that even Justices Lamar, Harlan, et al., in that case wobbled in their definition of interstate commerce. At page 108 it is said that interstate commerce embraces "all the means and instruments" by which it is carried on, and that McCall and his business constituted such; while on page 113 the decision approves *Smith vs. Alabama*, that sustains a State license on an engineer operating an interstate train, saying that, "so far as it affected commercial transactions among the states *its effect was so indirect, incidental* and *remote* as not *to burden or impede such commerce.*" We would ask (and we are sorry we cannot ask Justice Lamar) if an engineer running a train in interstate commerce, which train earns thousands of dollars of freight, is not a more direct "means and instrument" of interstate commerce than is the drummer who takes orders for part of the freight that is carried on that train? Presuming that McCall sold enough tickets to fill a train from Chicago to New York, we can say without contradiction that the crew, including conductor, fireman, engineer, brakeman, switchmen, the Pullman conductors, etc., that run that train from Chicago to New York would cost far more to the company than would be the cost in salary of McCall for securing the passengers. If McCall's work in securing the passengers was interstate commerce, if it was, in words of the decision, "a means and an instrument" for making that commerce larger, then we respectfully ask how much more so was the service of the train crew proper, Pullman car conductors, porters, dining car employees, etc., in carrying those passengers from Chicago to New York. And yet the great McCall case says that a license on a locomotive engineer was so remote and indirect as not to be a regulation of interstate commerce, notwithstanding that the

engineer was directly engaged in the actuality of the thing, in driving the engine, etc., without whose services the railroad would have been worthless, the train so much junk, and the passengers suing for damages and for the return of their money. Was not the engineer necessary to that interstate commerce? He was the acting head, the directing genius, on the spot, who more than president, board of directors, ticket agents, or anybody else actually drove the engine and train over the tracks and had more to do with very penny earned in their interstate commerce business than a hundred McCalls 3000 miles off in California could have had. Yet in the McCall case, McCall, then in San Francisco soliciting passengers, was considered to be engaged in interstate commerce so that he could not be compelled to pay a license, while Smith, the engineer in Alabama who was actually by his skill conducting the train and hauling passengers in interstate commerce, could be taxed a license because such tax was incidental to, and hence not a burden on, interstate commerce. We submit that without going any further, the Court is bound to hold that the McCall decision is contradictory and inconsistent.

Certainly if Smith, the locomotive engineer, carrying passengers in interstate commerce could be made to pay a license, then the plaintiff in error, not a hired, skilled and direct representative, but only an independent broker engaged in an agency business in New Orleans, doing at best one or two things remotely connected with interstate commerce, should also pay a license.

If counsel relies on the McCall decision, then he is bound to argue before this court that we could charge a license to every engineer, pilot and captain on each ship of the four companies (clients of plaintiff in error) coming into this port, because their duties are only "remotely and indirectly connected with interstate commerce," while at the same time we could charge

no license to plaintiff in error, because they are far more directly engaged in interstate commerce than are the captain, engineer and pilot of each of the ships, whose coal he engages, and for which he engages stevedores to unload. There is no escape from this conclusion.

In view of this, what is remote? What is direct? Or is it left to the Court in each case? A license on Smith, the locomotive engineer running a train from Chicago to New York, is valid because Smith is only remotely or indirectly engaged in interstate commerce, if at all. A license on McCall, the drummer over in San Francisco, soliciting passengers to ride on Smith's train, is unconstitutional, because McCall is directly engaged in interstate commerce. Is this the law? Certainly it is the law laid down in the McCall decision.

We might contend that to tax by license a salaried agent in an office rented by the railroad might be a direct regulation and burden on interstate commerce, and hence illegal, whereas if the agent was an independent broker working for a commission only and did the same work, a license on him would be legal and not a direct burden and regulation of commerce. That, however, is not the contention we make. But the only theory, the only possible hypothesis upon which the Court in the same decision could have approved both *Smith vs. Alabama* and *McCall vs. California* is predicated substantially on that very statement. Else the decision would be ridiculous in its inconsistency and contradiction. What we do argue is that in order for a tax to amount to a regulation of interstate commerce it must be levied on interstate commerce itself or so directly affect interstate commerce that it would be reflected in the expenses, receipts and profits of the very business of carrying on that interstate commerce; and if any decision was ever written to confirm and buttress that understanding and definition of the proposition, it is the McCall case.

McCall's services, which in reality, as the Court says, were only a "means or assistance in increasing the amount of passenger traffic," though not directly interstate commerce, are considered such when the charge or license for doing that business results in a direct charge on his principal who is engaged directly in interstate commerce, and hence becomes a prohibited burden on and regulation of that commerce. But if an independent agent, broker or commission merchant perform the same service that McCall did, and was paid a commission by his principal, a State law charging him a license predicated on the gross amount of his commissions would be legal and valid, because the license would be paid by him personally on the gross amount of *his* business, which is not interstate commerce, and because the license would not be paid by his principal (who paid it in the McCall case), the proof of which would be that no such charge could or would appear on the books or records of the principal. Hence, in the words of the McCall decision, that license would not be in the nature of a regulation of interstate commerce, but its effect would be "so indirect, incidental and remote as not to burden or impede such commerce." Whose commerce? Those engaged directly in interstate commerce, to-wit, the four steamship lines, clients of plaintiff in error.

Again we respectfully submit that our explanation irons out the apparent contradiction not only in this McCall decision, but as between the numerous cases decided first one way and then the other by the Supreme Court of the United States. Upon what other grounds can the McCall and the Ficklen cases, absolutely antagonistic, be reconciled? Justice Pitney and other jurists have never hit upon a satisfactory explanation of those two contradictory decisions, neither of which has been over-ruled. There must be some consistency, somewhere or somehow, between them, else they would not both have stood

for over thirty years, notwithstanding the numerous occasions on which the Supreme Court has since considered them.

Neither decision argues out the question nor treats the subject at length in a philosophic manner. We submit that our hypothesis is the only true one and that through which the apparent conflicts can be reconciled and the jurisprudence be demonstrated to be consistent.

In the *Ficklen case*, 145 U. S., p. 1, decided in 1892, Ficklen was a commercial agent or merchandise broker in Memphis, Tenn. He had no capital, was neither buyer nor seller of merchandise, but engaged exclusively in negotiating sales for his principals, just as a drummer does, only he was stationary in Memphis, where he exhibited samples and took orders for sales of merchandise for his principals, all of whom lived in other states, from which the merchandise so sold was to be shipped into Tennessee. The license was to be a flat $50 and, in his case, "two and a half per cent on the gross yearly commissions, charges or compensation for such business." The court held this license not an interference with interstate commerce.

Ficklen sold the goods for clients engaged in interstate commerce in other states. McCall sold tickets for a client engaged in interstate commerce in another state. The license on McCall was held to be a direct burden and regulation on interstate commerce. The license on Ficklen (two years later) was held to be legal and not a burden and regulation on interstate commerce. At page 24, Chief Justice Fuller in the decision makes this statement:

> "This tax is not on the goods or on the proceeds of the goods. Nor is it a tax on non-resident merchants. If it can be said to affect interstate commerce in any way it is incidentally and so remotely as not to amount to a regulation of such commerce."

At page 21 the Court further says:

> "And where a resident engages in such general business subject to a particular tax, the fact that the business done chances to consist for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution."

Almost the identical language that Justice Lamar used in the McCall case, in approving *Smith v. Alabama*. What were the sole and only facts in common between Smith and Ficklen? Each was the means or instrumentality in assisting interstate commerce, each individually paid a license "that did not necessarily involve the taxation of interstate commerce." But McCall, so counsel says, did just what Ficklen did, and the same judge that said Smith's license was "indirect and remote," said McCall's license was a direct regulation. Why? Because it was reflected in the railroad charges and hence was a burden on them, while neither Ficklen's license nor Smith's license was a direct burden on the principal. Yet the same Judge Harlan that approved of the Smith case, wrote a dissenting opinion in the Ficklen case. Probably in his youth he had been a traveling salesman; if that be wrong, then his mind worked in channels incomprehensible to an ordinary intellect.

It is to be noted also that though, as a matter of fact, each and every act done by the complainants in the *Ficklin case* in the conduct of their business, each and every sale made by them, was an act or sale in interstate commerce, nevertheless the Supreme Court of the United States held, after taking cogniaznce of this feature of the case, that the complainants were, nevertheless, subject to the payment of a license because they had undertaken to do "a general commission business," and by way of distinction said that the case would be different had they "simply

transacted business for non-resident principals." In other words, this case clearly recognizes the distinction between a simple agency for non-resident principals and a general commission business, between merely acting for a non-resident principal and doing a business in which transactions for non-resident parties forms a part. The *Ficklin case* is, therefore, practically on all fours with the case at bar, where the plaintiff in error (even if it be conceded that plaintiff in error's services really constitute acts in interstate or foreign commerce) has undertaken to do a general steamship agency business—has not merely undertaken an agency, but has undertaken a business—or, as admitted by plaintiff in error's own counsel, it is "willing to act for all the principals that will engage its services and renders service to anybody and takes agency from anyone from any part of the world," and this it undertakes to do regardless of whether the acts it will be required to do in the discharge of the business committed to it constitute interstate commerce or not.

On page 21 of his brief in this Honorable Court, Counsel quotes the concluding words of the opinion of this Honorable Court in the *Ficklin case*:

> "What position they would have occupied if they had not *undertaken* to do a *general commission* business and had taken out no license therefor, but had simply transacted business for non-resident principals, is an entirely different question which does not arise upon this record."

This notwithstanding the fact that in the statement of the case on page 1, the Court says of Ficklin's business, that all of it was "on behalf of principals residing in other states, and the goods so sold were, at the time of the sales, in other states, to be shipped into Tennessee as sales should be affected."

Note that in the first quotation, the one quoted in his brief, the language is what position they would have occupied if they

had not undertaken to do a general business, etc., and then the Court says in the second quotation by ourselves that as a matter of fact, like plaintiffs in error, the business they actually did was all *interstate* commerce. Note the deadly parallel between the case at bar and the *Ficklin case*. On transcript, page 15, the Judge of the Civil District Court in trying to get at the business done by plaintiffs in error asked of the Manager of the Texas Transport and Terminal Company, plaintiffs in error:

"What I mean by the word 'general'—it is rather more comprehensive than it should be—what I mean is that it is general (the business done by the witness) in the sense that you render service to anybody and take agencies from anyone from any part of the world."

Answer: "Yes."

Counsel in this case on transcript, page 15, says: "We admit that they (his clients) are very willing to act for all the principals that will engage their services.

The above needs no argument to show that plaintiffs in error have also during the year for which the license is charged "undertaken to do a general commission business" as steamship agents or brokers and therefore their own admissions coupled with their own quotation from the *Ficklen case* we repeat shows that this case is on all fours with the *Ficklin case* and is in effect a perfect and deadly parallel to that case.

The thing that is laid hold of as the subject of the license is a business carried on within the City of New Orleans. Plaintiff in error is asked to pay a license, not as the agent of certain interstate and foreign shipping companies, but because it carries on a local business or occupation of its own and for its own account and profit, a business consisting of the rendition of certain services to steamship companies, which it undertakes to render for a commission or percentage remuneration and regard-

less of whether or not that service involves interstate commerce, just as a drayman undertakes to carry goods by dray, regardless of whether or not those goods are to constitute an interstate shipment, and just as the complainants in the *Ficklin case* undertook to sell goods on a commission basis regardless of whether or not all sales made by them should be acts of interstate commerce. That the drayman would not be exempt from a license is certain; that the general commission merchant is not exempt is settled by the *Ficklin case*, and that a general commission steamship agency business is not exempt follows conclusively from a consistent application of sound reasoning to an absolutely parallel case.

In his dissenting opinion on page 27, Justice Harlan approves *Norfolk R. R. Co. v. Pennsylvania*, 136 U. S. 114, forbidding a tax by the State on an interstate railroad for keeping an office in Philadelphia. The tax on the railroad was a tax on interstate commerce. Correct. Yet in the Smith case he joins in the decision, holding that the license tax of a locomotive engineer of an interstate commerce railroad was legal because the tax was remote and indirect. How can his apparent inconsistency be explained except on the only irresistible theory that had the railroad paid the license of its engineer, as it did for McCall, and as it did for the office in the Norfolk Railroad case, it would also have been unconstitutional? If he holds that Smith was not in interstate commerce in his dissenting opinion in the Ficklin case, why was he not consistent and why did he not also hold that a license paid by Ficklen on his gross commissions was not, any more than in the engineer's case, a direct tax and burden on the principals engaged in interstate commerce? We do not know and unfortunately the distinguished jurist is with us no longer, nor is his former sympathetic associate, Justice Lamar.

Later, in 1904, Mr. Justice Brewer, who, it will be recalled, dissented in the *McCall case*, expressed his views on the subject

in a short and to the point decision in the case of *State of New York, ex rel. Penn. R. R. v. Knight*, 192 U. S., 21. The facts in the case are as follows:

The Pennsylvania Railroad Company established a cab stand on its premises at the Twenty-third Street Ferry in New York and maintained a service of cabs and coaches. The business done by these cabs and coaches consisted in bringing the company's passengers to and from its ferry. The railway company contended that the cab service was merely an extension and, therefore, a part of interstate transportation; that it was not carrying on a cab service generally in the City of New York, but was merely furnishing the service to those who seek to undertake an interstate journey over its lines, thus commencing the journey from their hotels instead of from the ferry landing or like service to those who have already received such interstate transportation, thus completing the transportation to their places of destination. In other words, the company, in order to promote its general business, sought only to complete the continuous transportation of interstate passengers to or from the residence or hotel of its passengers instead of commencing and ending such transportation at the ferry landing on Twenty-third Street.

Mr. Justice Brewer held:

> "As we have seen the cab service is rendered wholly within the State and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a State it is presumably subject to State control. The burden is on him who asserts that, though actually within, it is legally outside the State, and unless the interstate character is established locality determines the question of jurisdiction."

And further on in the same decision Mr. Justice Brewer said:

> "As shown in the opinion, from which we have just quoted, many things have more or less close relation to interstate commerce, which are not properly to be regarded as a part of it. If the cab, which carries the passengers from the hotel to the ferry landing, is engaged in interstate transportation, why is not the porter, who carries the traveler's trunk from his room to the carriage, also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed? We are of opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation."

We submit that the learned counsel for the Texas Terminal & Transportation Company, Inc., has not shown, and that he cannot show, that his client is actually and exclusively engaged in interstate or foreign commerce, but, on the other hand, he has simply shown that his client is engaged in a general, independent brokerage business, a part of which business is preliminary to or subsequent to interstate or foreign commerce, and that the connection that it has with interstate commerce as such is only incidental and very remote. Adopting Justice Brewer's words in the *Pennsylvania case*, we ask:

"And where will the limit be?"

Defendant employs stevedores to load and unload the cargo; it employs sailors and obtains their certificates; it buys the coal for the ship; it clears the ship at the Customhouse and attends to many other matters of detail, all of which form a part of its service to its principal. Will counsel argue that arranging with a stevedore to unload a ship is interstate commerce, or that procuring coal or other supplies for a ship is interstate commerce?

If so, we repeat, amplifying Judge Brewer's opinion, that counsel himself is engaged in interstate commerce *quoad* his services in such cases as this; that the stevedore and the boss drayman, who haul the cargo, are engaged in interstate commerce; that the warehouseman, who stores the cargo, is engaged in interstate commerce; that the man who sells motor trucks or mules to the boss drayman *quoad* such service as rendered herein is engaged in interstate commerce, and that no license taxes should be paid by any of these businesses. Follow the theory of the *McCall case* and it leads to a *reductio ad absurdum*.

The principle involved in the *Ficklin case*, which was decided two years subsequent to the *McCall case*, has been consistently adhered to by the Supreme Court of the United States.

Cases dealing with other phases of the same question are in our favor, particularly the very recent case of *American Manufacturing Co. v. St. Louis*, 250 U. S. 460, where the manufacturer's license tax was computed exclusively on the output of his factory, all sold in interstate commerce.

We repeat that the license must be a direct burden on and regulation of interstate commerce within the purview of a strict construction of Article I of the United States constitution, and that the most logical test of this proposition is that such commerce must in some way directly reflect that license as a burden or charge on the commerce itself or the principals engaged in that commerce.

Counsel in his brief says that many cases in the Supreme Court on the subject have approved the McCall case, listing 17 cases from that Court. We, too, have examined each and every one of these cases and submit that, barring one, to-wit, *Hopkins vs. United States*, 171 U. S. 573, the Court did not argue out at length or analyze the principles involved, but did nevertheless substantially interpret the McCall case just as we construe it, as a case where the tax was direct on the commerce

of the principal, and hence not remote, incidental or indirect, but must be reflected by that commerce of the principal as a charge thereon.

In *International Textbook Co. v. Pigg*, 217 U. S. 110, the business of plaintiff was the furnishing of courses of instruction by correspondence, and the question involved in the case was whether or not a state could require the plaintiff to take out a license to do its business in the state. The court quoted from *Crutcher v. Kentucky*, 141 U. S. 47, as deciding that regulations requiring express companies (and other companies doing an interstate business) to pay a license as a condition precedent to carrying on the business of interstate commerce were clearly a burden on that commerce, and then referred to the McCall case as being to the "same general effect"—that is to say, a tax laid directly on the company engaged in interstate commerce is a tax on that commerce itself.

In *Norfolk & Western R. R. v. Pennsylvania*, 136 U. S. 114, a Pennsylvania statute provided that no foreign corporation should have an office in the state for its employees, etc., unless it first obtained a license to do so. The plaintiff was a Virginia corporation operating a railroad which was a link in a through line of railroad over which freight and passengers were carried into and out of the state, and plaintiff was held to be engaged in interstate commerce. The court said that a state cannot, under guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce or impose burdens on such commerce within its limits, and referred to the McCall case as reciting some of the cases sustaining this proposition. It is to be noted that here the exclusion was of an office of a railroad company itself, and that the cost of the license fell directly on that interstate carrier.

In *Crutcher v. Kentucky*, 141 U. S. 47, as hinted above, a state statute required foreign express companies to take out a

license to do business in the state. The court said: "This, of course, embraces interstate business as well as business confined wholly within the State," and further on the court cites the McCall case along with others in which it had "decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce." It is to be noted that the company did "interstate business" as well as intrastate business, and that the license, borne directly by the company, necessarily affected its interstate business as well as its local business.

In *Pacific Express Company v. Seibert*, 142 U. S. 349, a Missouri statute required express companies to pay a tax based on receipts for sums earned and charged for business done within the state. The plaintiff contended that this statute imposed a tax on interstate commerce, and that to that extent it was forbidden by the Federal Constitution. The court declared that a state cannot lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce and amounts to a regulation of it which belongs to Congress; and the court cited the McCall case in support of that declaration; but it also said that the proposition of the plaintiff was unsound, because " a proper construction of the statute confines the tax which it creates to the intrastate business and in no way relates to the interstate business of the company. * * * * These provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other states and the State of Missouri, expressly limit the tax to receipts for the sums earned and charged for the business done within the State."

In *Hooper v. California*, 155 U. S. 653, the court says: that while the right of a foreign corporation to do business within a state other than its creation depends solely upon the will of such other state, is well settled as a general rule, there are exceptions which embrace a case where the corporation rests its right to engage in business therein upon the Federal nature of its business, such as the performance of a quasi-governmental function, or where it is a necessary instrument of interstate commerce, or its business constitutes such commerce; and the court simply refers to the McCall case as one of many in which the reasons for this exception are explained.

In *Brennan v. Titusville*, 153 U. S. 289, a manufacturer of picture frames in Illinois employed an agent to solicit orders for picture frames in other states. Upon receiving orders the agent forwarded them to the manufacturer, who shipped the frames to the purchasers, the price being collected by express companies or sometimes by the agent himself. A city ordinance sought to charge this manufacturer's sales agent a license for the privilege of soliciting orders. The court said: "That this license tax is a direct burden on interstate commerce is not open to question;" and later referred to the McCall case as "replying to the objection that this (the license tax on McCall) only indirectly affected the commerce of the road." This case clearly recognizes that the tax in order to be unconstitutional must have a direct bearing on interstate commerce, and the McCall case is cited to that effect.

In *Williams v. Fears*, 179 U. S. 270, a revenue act of Georgia levied a specific tax upon many occupations, including "emigrant agents," meaning persons engaged in hiring laborers to be employed beyond the limits of the state. The court said: "The real question is, does this law amount to a regulation of commerce among the states? To answer that question in the affirmative is to hold that the emigrant agent

is engaged in such commerce, and that this tax is a restriction thereon." The court then refers to the McCall case by saying that in that case "the business was *directly* connected with interstate commerce, and consisted wholly in carrying it on. The agent was the agent of the transportation company, and he was acting solely in its interests." And finally the court decided that the imposition of the tax on the emigrant agent fell within the distinction between interstate commerce, or an instrumentality thereof, and the mere incidents which may attend the carrying on of such commerce, and that he could be charged a license."

In *Stockard v. Morgan*, 185 U. S. 27, the court refers to the McCall case as following the *Robbins case*, 120 U. S. 489, a leading case holding that interstate commerce cannot be taxed at all by a state; but the court also refers to and distinguishes and sustains the Ficklen case, showing that in the case of Stockard, "his principals are specific parties, firms or corporations, all non-residents of Tennessee and residents of other states in the United States, and *he does not represent or hold himself out as representing the public in general*, or negotiate or sell for any resident of Tennessee" (p. 29), whereas "a material fact in the (Ficklen) case was that Ficklen had taken out a general and unrestricted license to do business as a broker, and he was thereby authorized to do any and all kinds of commission business, and therefore became liable to pay the privilege tax enacted. Although Ficklen's principals happened in the year 1887 to be wholly non-residents, the fact might have been otherwise, as was stated by the Chief Justice, because his business was not confined to transactions for non-residents."

In *Western Union Tel. Co. v. Kansas*, 216, U. S. 1, an act required plaintiff company to pay a given per cent of its authorized capital as a condition of its right to continue to do a domestic business in Kansas. The court held that this require-

ment, by its necessary operation, directly burdened and embarrassed interstate commerce, and cited the McCall case in support of its decision.

In *Saulte Ste Marie v. International Transit Co.*, 234 U. S. 341, a city ordinance exacted a license fee for a ferry between Michigan City and the Canadian shore. The court held this to be unconstitutional, citing the McCall case for the doctrine that no license can be exacted by a state for carrying on interstate commerce.

In *Kansas City Ry. v. Kansas*, 240 U. S. 227, a state statute levied a franchise tax upon the right of corporate existence. Plaintiff was a railroad corporation organized under the laws of that state. The court after stating that interstate commerce could not be taxed by states, and citing the McCall case in support of that doctrine, nevertheless held that states could levy a corporate franchise tax on a domestic corporation carrying on interstate commerce.

In *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 153, the plaintiff, a Connecticut manufacturer, maintained a selling office in Massachusetts, with salesmen soliciting orders in New England. The goods were shipped to purchasers directly by the Connecticut office, which also directly paid the salesmen, rent and other expenses of the Massachusetts office. The court said that this was not a local business as distinguished from interstate commerce and, holding that it was immune from state taxation, cited the McCall case.

The case of *Armour & Co. v. Virginia*, 246 U. S. 1, was referred to during the argument by Mr. Justice O'Niell. A Virginia statute imposed a license on merchants based on the amount of purchases, including as such merchandise manufactured by the licensee and sold in the state, but excluding manufacturers taxed on their capital. Plaintiff, a New Jersey corporation, engaged in Virginia in selling their packing house

products, through agencies which they established. The suit grows out of the license claimed from the plaintiff. Among other objections, they charged that the statute was discriminatory, because it excluded from liability persons who manufacture commodities in Virginia and sold them there, and that as to the goods plaintiff shipped into and sold in Virginia the license was a direct burden on interstate commerce. The court held (pp. 5, 6) that the statute was not discriminatory since the exclusion from license was open to all, whether citizens of Virginia or not, and hence, plaintiff was at no disadvantage; that the license applied to manufacturers in Virginia if they sold goods by them manufactured at a place other than the place of manufacture, and that disadvantage to plaintiff was a mere indirect consequence of a lawful exercise of the state's authority and was not a direct burden on interstate commerce.

So far as the above case applies herein it is distinctly in our favor. If a license on Armour & Company for goods brought into Virginia and there sold through their agents directly (and your attention is called to the fact that the clear inference is that these were their special employed agents and representatives, not independent brokers selling their meats on commission is an indirect or remote tax or burden on interstate commerce, then the same reasoning applied to this case would show equally that the license herein, not against the principals, such as Armour & Company, but against an independent and general agent, is even a more indirect and remote tax on interstate commerce, if it could be considered such at all.

In closing, we beg to call your attention to one of the ablest, most logical and best reasoned cases on this whole subject, to-wit, *Hopkins v. United States*, 171 U. S. 578. A reading of this case will clarify the situation more than will the reading of the average half-dozen cases on the subject.

The purpose of the action was to dissolve the Kansas City Livestock Exchange and enjoin its members from continuing an unlawful combination in restraint of trade. The business of its members was to receive individually consignments of live stock not only from Kansas and Missouri, but from other states as well, and to feed such stock and prepare it for the market, dispose of it, and receive the proceeds thereof from the purchaser, pay the owners their proportion of the proceeds, after deducting charges, expenses and advances. (Note the peculiar parallel to the cases at bar.) The members solicited consignments from owners and made them advances thereon. If appellants by collecting freight for steamships, paying their local expenses and remitting the balance are thereby engaged in interstate commerce, how much more so were Hopkins and others, who in addition to doing the same things actually advanced heavily on live stock and so in addition had a direct interest in the shipment to the extent of such advances? To such an extent that the court says (p. 580): "The market is largely sustained by means of the money thus advanced to cattle raisers by the defendants, and that Kansas City is the only place for miles about, which constitutes an available market for the purchase and sale of live stock from the large territory located in the states and territory already named."

The question was, were the defendants engaged in interstate commerce. The court answers (p. 587):

> "Is it interstate commerce in the sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or a facility to commerce, and which, if it affects commerce at all, does so only in an indirect and incidental manner?"

Further:

> "The sale or purchase of livestock as commission merchants at Kansas City is the business done, and its

character is not altered because the larger portion of the purchases and sales may be of live stock sent into the state from other states and from the territories. * * * * If an owner of cattle in Nebraska accompanied them to Kansas City and there personally employed one of these defendants to sell the cattle at the stockyards for him *on commission*, could it be properly said that such defendant in conducting the sale for his principal was engaged in interstate commerce? * * * * We think not. On the contrary, we regard the services *as collateral* to such commerce and in the nature of a *local aid or facility provided for the cattle owners* toward the accomplishment of his purpose to sell them."

Apply the same reasoning to our case and it must be concluded that in licensing plaintiff in error, so far from directly regulating or taxing the business of foreign ships, the City of New Orleans is affording to each and every client of plaintiff in error and also "*a local aid or facility*" toward the accomplishment of their purpose to engage, deliver and sell their cargoes in the port of New Orleans.

The court then further says that the character of the transaction is not altered if the owner, instead of accompanying the cattle, sends them by common carrier consigned to one of the defendants in Kansas City with instructions to sell them and render him an account of the proceeds. It is urged, says the court (p. 589), that because defendants promote the business of selling cattle upon consignment from other states, because they send agents into other states to solicit business for them, because they loan money to the cattle owners and take mortgages upon the cattle, hence advancing a portion of the purchase price of the cattle to be sold by paying drafts drawn upon them by the shippers, that all such acts constitute interstate commerce. Answering this, the court said (p. 590):

"All this is done as a means towards an end; as an inducement to the cattle owner to give one of the defend-

ants the business of selling the cattle for him." (All that appellants do is a means towards the end of inducing the steamship companies to give them their business of engaging cargoes and unloading the same and doing other things.) * * * * * "That business is not altered in character because of the various things done by defendants for the cattle owner in order to secure it." * * * * "They do not purchase the cattle themselves; they do not transport them. * * * * Thus everything at last centers at the market at Kansas City, and the charges are for services there, and there only, performed."

"The selling of an article at its destination, which has been sent from another state, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce. * * * * Granting that the cattle themselves, because coming from another state, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce." (P. 591.)

"The seller," says the court, simply aids the owner in finding a market, "but the facilities thus afforded the owner by the agent are not of such a nature as to thereby make that agent an individual engaged in interstate commerce * * * * Charges for the transportation of cattle between different States are charges for doing something which is one of the forms of and which itself constitutes interstate trade or commerce, while charges or *commissions* based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming part of, interstate commerce, although the cattle may have come from another state. Charges for services of this nature do not immediately touch or act upon nor do they

directly affect the subject of the transportation. Indirectly and as an incident they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by a purchaser, but they are not charges which are directly laid upon the article in the course of transportation, and which are charges upon the commerce itself; they are charges for the facilities given or provided the owner in the course of the movement from the home situs of the article to the place and point where it is sold. (p. 592) * * * * There must be some direct and immediate effect upon interstate commerce in order to come within the act. The State may levy a tax upon the earnings of a commission merchant which were realized out of the sales of property belonging to non-residents, and such a tax is not one upon interstate commerce because it affects only incidentally and remotely although certainly." Citing *Ficklen vs. Shelby County*, 145 U. S. 1.

This case was decided about ten years after the McCall and Ficklen cases, and if the argument so far has not sustained our theory that the tax is not directly on interstate commerce, as it would be if the cattle owner instead of the general agent had been charged the tax, and hence is not unconstitutional, we cannot find any stronger language to sustain our theory and argument.

For the above reasons we submit that if by any stretch of the law, the license tax on plaintiff in error, engaged in the business of a steamship agency—a general independent agency in the City of New Orleans—can be said to affect interstate commerce at all, it is clear that it does so only remotely and indirectly and does not amount to a burden on or regulation of interstate commerce within the contemplation of Article 1 of the Federal Constitution. We repeat that the practical proof that this license is not a direct tax on interstate commerce is that neither the business of the steamship companies (the only one engaged

in interstate commerce), nor their books, nor their expense account, nor their receipts, nor their profits, show or can show, according to the evidence before this court (Tr. p. 19), that the steamship companies have ever paid one penny of license either directly or indirectly to this city for carrying on their interstate commerce in New Orleans.

Therefore we respectfully submit that the judgment of the Supreme Court of Louisiana should be affirmed.

Respectfully submitted,

IVY G. KITTREDGE,
City Attorney.

W. CATESBY JONES,
Assistant City Attorney.

Counsel for the City of New Orleans,
Defendant in Error

January, 1924.

ERROR to a judgment of the Supreme Court of Louisiana, which affirmed a judgment for the City of New Orleans in an action for a license tax.

Mr. George H. Terriberry, with whom *Mr. W. W. Young* and *Mr. Joseph M. Rault* were on the briefs, for plaintiff in error.

Mr. W. Catesby Jones, with whom *Mr. Ivy G. Kittredge* was on the brief, for defendant in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The City of New Orleans brought this action in a Louisiana state court to recover from defendant (plaintiff in error here) a license tax of $400, imposed, for the year 1922, upon its business of steamship agent. The demand was resisted on the ground that the tax was in contravention of the Commerce Clause of the Constitution of the United States in that it was an interference with and tax upon interstate and foreign commerce. Defendant was regularly employed as agent for four steamship lines, under a contract fixing its compensation on the basis of commissions, calculated upon the gross amount of freight charges collected by it for each company. In addition, defendant occasionally represented other ship owners. All were exclusively engaged in interstate or foreign commerce, and defendant's business was confined solely to representing principals so engaged in such commerce. The service rendered consisted of soliciting and engaging cargo, nominating ships for carrying it, arranging for its delivery on the wharf, issuing bills of lading under the name of ship owner or charterer, arranging for stevedores for loading and discharging cargo, collecting freight charges, paying ships' disbursements, attending to immigration service and assisting generally in matters of local customs and regulations.

Freight moneys collected, after deducting commissions, were remitted to the owners or charterers. As such agent, defendant was authorized to solicit cargo and quote freight rates and to issue receipts in the name of its principal for cargo delivered on the wharf.

Upon these facts the trial court held that defendant's business was local in character and subject to the tax. Upon appeal, this judgment was affirmed by the State Supreme Court. 152 La. 497.

The State Supreme Court thus stated the necessity and character of the agent's duties:

"The business of steamship agents is an extensive business in New Orleans, as it is in every large seaport. As a separate or an independent business, it is a result of the development of the country's commerce with foreign nations and among the several states. In the early days, when time was not so much the object or subject of economy as it is today, every ship's captain, for his own ship, discharged the duties and rendered the services for which local steamship agents are employed nowadays. But it would be impracticable now for a ship's captain to remain with his ship in port long enough to attend to the many matters which the local steamship agents can and do attend to for a ship at sea or in a foreign port. The business of steamship agents is therefore a necessary adjunct to commerce on the high seas."

This Court has had frequent occasion to consider and determine the effect of taxes of the same general character as that here involved, and, for present purposes, we find it unnecessary to do more than refer to the general and well established rule, which is that a State or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a nonresident within the State prior to their introduction therein, *Stockard* v. *Morgan*, 185 U. S. 27; or to impose a tax upon persons for securing or seeking to secure the trans-

portation of freight or passengers in interstate or foreign commerce. *McCall* v. *California*, 136 U. S. 104. The latter decision controls the present case. There the agent of a railroad company was engaged in San Francisco in the business of soliciting and inducing persons to travel from the State of California into and through other States to New York City, over the line of railroad which he represented. It was held that the business of the agent constituted a method of securing passenger traffic for the company, and therefore (p. 109) the tax was one "upon a means or an occupation of carrying on interstate commerce, pure and simple." The only difference between that case and this is that there the agent was engaged in seeking interstate passenger business, while here the agent was engaged in seeking interstate and foreign freight business. Plainly, as pointed out in the *McCall Case* (p. 109), the principle is the same.

Ficklen v. *Shelby County Taxing District*, 145 U. S. 1, is relied upon to justify the tax, but quite clearly it does not do so. The facts of that case differ materially from those of the *McCall Case* and those with which we are here dealing. In the *Ficklen Case* complainants were general merchandise brokers. They paid the initial tax imposed by the Tennessee law for the year 1887 and received and held throughout the year a general and unrestricted license to do business as such. They thereby became liable, under the statute, to pay an additional privilege tax in part graduated according to the amount of commissions received. It happened that, during 1887, the principals of one complainant were wholly nonresident and those of the other, largely so. The opinion pointed out that the fact might have been otherwise then and afterward, since their business was not confined to transactions for nonresidents. At the expiration of the year complainants applied for a renewal of their licenses, which was refused because they had made no return of their commis-

sions and no payment of the tax, as required. In deciding the case, stress was laid upon the fact that they had taken out a license under the law to do a general commission business, had given bond to report their commissions during the year and to pay the required percentage thereon; and, agreeing with the state court, it was said that resort to a judicial remedy could not be had because the authorities had refused to issue a license for the ensuing year without payment of the stipulated tax. Concluding the opinion, it was said: "What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record." The decision rests largely upon the elements above stated, as was pointed out by Mr. Justice Brewer in *Brennan* v. *Titusville,* 153 U. S. 289, 307:

"It was held that the tax was an entirety, and was not affected by the variable and adventitious results of business from year to year. . . . In other words, the tax imposed was for the privilege of doing a general commission business within the State, and whatever were the results pecuniarily to the licensees, or the manner in which they carried on business, the fact remained unchanged that the State had, for a stipulated price, granted them this privilege. It was thought by a majority of the court that to release them from the obligations of their bonds on account of the accidental results of the year's business was refining too much, and that the plaintiffs who had sought the privilege of engaging in a general business should be bound by the contracts which they had made with the State therefor."

The case is near the border line and has been deemed exceptional. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 296; *Stockard* v. *Morgan, supra,* pp. 34-37.

The present case is sufficiently differentiated by the fact that the agent here neither did nor held itself out as ready to do a general business, partly local and partly interstate and foreign, but confined itself exclusively to the latter.

Reversed.

MR. JUSTICE BRANDEIS dissenting, with whom MR. JUSTICE HOLMES concurs.

From the multitude of cases, this general rule may be educed.[1] The validity of a state tax under the commerce clause does not depend upon its character or classification. It is not void merely because it affects or burdens interstate commerce. The tax is void only if it directly burdens such commerce, or (where the burden is indirect) if the tax discriminates against or obstructs interstate commerce. In this case there is no claim that interstate commerce is discriminated against or obstructed. The contention is that the tax imposes a direct burden. Whether the burden should be deemed direct depends upon the character of plaintiff's occupation and its relation to interstate transactions.

The occupation tax laid by New Orleans is fixed in amount;—businesses being classified into several grades according to the amount of business done. The Texas Transport & Terminal Company falls within the highest grade—those whose receipts exceed $100,000 a year—and, thus, it is taxed $400 a year. The business is what is called a steamship agency. The main office is in New York City. It has branches in New Orleans and in five other ports of the United States. It is a wholly independent concern. No ship owner has an interest in it; and it has no interest in any ship which it serves. Some

[1] Compare Thomas Reed Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 31 Harv. Law Rev. 321, 572, 721, 932; 32 Harv. Law Rev. 234, 374, 634, 902.

of these are regular ocean liners; others are casual tramp ships. The services rendered include, among other things, arranging with independent stevedore concerns for discharging and loading cargoes; arranging with independent dealers for bunkering, that is, buying fuel and oil; making provision for fitting ships for any special or peculiar cargo; making provision for compliance with the immigration and customs laws; and paying the ship's disbursements. For these, and the other services of soliciting cargoes, arranging for their delivery, and collecting payment for freight, the company is compensated. Usually the compensation is measured by a percentage on the gross freight charges collected. Sometimes it is a lump sum for each ship served. These comprehensive services require, for their efficient performance, the employment of a steamship agency, or its equivalent, whatever the home port of the ship or the principal place of its owner's business.

It is settled law that interstate commerce is not directly burdened by a tax imposed upon property used exclusively in interstate commerce, *Transportation Co.* v. *Wheeling*, 99 U. S. 273, 284; *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299, 306; or by a tax upon net income derived exclusively from interstate commerce, *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321; *Shaffer* v. *Carter*, 252 U. S. 37, 57; compare *Peck & Co.* v. *Lowe*, 247 U. S. 165; or by an occupation tax, fixed in amount, although the business consists exclusively of selling goods brought from another State. *Wagner* v. *City of Covington*, 251 U. S. 95. On the other hand, the burden is deemed direct, where the tax is upon property moving in interstate commerce, *Champlain Realty Co.* v. *Brattleboro*, 260 U. S. 366; or where it lays, like a gross-receipts tax, a burden upon every transaction in such commerce "by withholding, for the use of the State, a part of every dollar received in such transactions,"

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292, 297; or where an occupation tax is laid upon one who, like a drummer or delivery agent, is engaged exclusively in inaugurating or completing his own or his employer's transaction in interstate commerce. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Davis* v. *Virginia*, 236 U. S. 697.

The New Orleans tax is obviously not laid upon property moving in interstate commerce. Nor does it, like a gross-receipts tax, lay a burden upon every transaction. It is simply a tax upon one of the instrumentalities of interstate commerce. It is no more a direct burden, than is the tax on the other indispensable instrumentalities; upon the ship; upon the pilot boat, which she must employ; upon the wharf at which she must load and unload; upon the office which the owner would have to hire for his employees, if, instead of engaging the services of an independent contractor, he had preferred to perform those duties himself. The fact that, in this case, the services are performed by an independent contractor having his own established business, and the fact that the services rendered are not limited to soliciting, differentiate this case from *McCall* v. *California*, 136 U. S. 104. If these differences are deemed insufficient to distinguish that case from the one at bar, it should be frankly overruled as inconsistent with the general trend of later decisions.